

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TAMRA C.,

Plaintiff,

v.

ANDREW M. SAUL,
Commissioner of Social Security,

Defendant.

CASE NO. C20-5281-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1962,¹ has a high school education, and previously worked as a ticket agent for an airline. (AR 28.) Plaintiff applied for DIB in August 2016. (AR 20.) That application was denied initially and upon reconsideration, and Plaintiff timely requested a hearing. (*Id.*) On January 10, 2019, ALJ Allen G. Erickson held a hearing, taking testimony from Plaintiff

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 and a vocational expert (VE). (AR 37-83.) On February 7, 2019 the ALJ issued a decision finding
2 Plaintiff not disabled. (AR 17-28.) Plaintiff timely appealed. The Appeals Council denied
3 Plaintiff's request for review (AR 1-6), making the ALJ's decision the final decision of the
4 Commissioner. Plaintiff now seeks judicial review.

5 **JURISDICTION**

6 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

7 **DISCUSSION**

8 The Commissioner follows a five-step sequential evaluation process for determining
9 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
10 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
11 engaged in substantial gainful activity from May 11, 2012, the alleged onset date, through
12 December 31, 2013, the date last insured (DLI). (AR 23.) At step two, it must be determined
13 whether a claimant suffers from a severe impairment. The ALJ found severe Plaintiff's lumbar
14 spine degenerative disc disease; lumbar spine degenerative joint disease; and status post cervical
15 spine surgery. The ALJ found not severe plaintiff's scoliosis, hypertension, sinusitis and
16 bronchitis. The ALJ noted allegations of mental health symptoms and hand difficulties, but found
17 these conditions either not medically determinable during the relevant time period. (AR 23-24.)
18 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
19 found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR
20 24.)

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant has
23 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of

1 performing light work as defined in 20 CFR 404.1567(b) with additional limitations to occasional
2 crawling and climbing ladders, ropes or scaffolds; occasional exposure to vibration and extreme
3 cold temperatures, and occasional reaching overhead bilaterally. (AR 24.) With that assessment,
4 and with the assistance of the VE, the ALJ found Plaintiff able to perform past relevant work as a
5 ticket agent. (AR 28.) The ALJ concluded Plaintiff was not disabled at any time between May 11,
6 2012 through December 31, 2013. (*Id.*)

7 This Court's review of the ALJ's decision is limited to whether the decision is in
8 accordance with the law and the findings supported by substantial evidence in the record as a
9 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
10 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
11 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
12 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
13 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
14 2002).

15 Plaintiff argues the ALJ erred in (1) finding Plaintiff's mental impairments of depression
16 and anxiety not severe at step two; (2) assessing certain medical evidence and opinions; (3)
17 discounting her testimony; and (4) fashioning the RFC. The Commissioner argues that the ALJ's
18 decision is supported by substantial evidence and should be affirmed.

19 Step Two

20 At step two, a claimant must make a threshold showing that her medically determinable
21 impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*,
22 482 U.S. 137, 145 (1987); 20 C.F.R. § 404.1520(c). To establish a severe impairment at step two,
23 the condition "must result from anatomical, physiological, or psychological abnormalities that can

1 be shown by medically acceptable clinical and laboratory diagnostic techniques. Therefore, a
2 physical or mental impairment must be established by objective medical evidence from an
3 acceptable medical source.” 20 C.F.R. §404.1521. Plaintiff carries the burden of proving an
4 impairment is disabling--a statement of symptoms is insufficient. *Miller v. Heckler*, 770 F.2d 845,
5 849 (9th Cir. 1985).

6 Plaintiff argues the ALJ erred at step two in finding anxiety and depression not severe
7 impairments.

8 The ALJ took note of plaintiff’s hearing testimony that she struggled with depression and
9 anxiety. (*See, for example*, AR 48-50, 74-75.) Plaintiff reported experiencing social isolation, low
10 motivation, and diminished concentration. (AR 24, *citing* AR 342.) However, the ALJ found
11 plaintiff’s report of symptoms “not documented by any acceptable clinical or laboratory findings
12 to establish that she had a severe medically determinable mental...impairment through the date
13 last insured.” (*Id.*) The ALJ also cited a lack of evidence of mental health treatment until after the
14 date last insured. (AR 27, *citing* AR 422 and AR 505-06).

15 While plaintiff cites to her mention of depression in a chart note dated from the relevant
16 time period (AR 1095-97), plaintiff fails to cite any record evidence of “medically acceptable
17 clinical and laboratory diagnostic techniques” to establish the diagnosis of a mental health
18 condition. 20 C.F.R. §404.1521. Plaintiff fails to demonstrate error in the ALJ’s step two
19 consideration of a mental health impairment.

20 Medical Evidence

21 Plaintiff argues the ALJ erred in considering medical opinions that post-date the relevant
22 period, May 12, 2012 through December 31, 2013. Dkt. 23 at 7. It is a bit difficult to discern
23 which opinion evidence is challenged by plaintiff, as well as the basis thereof. While medical

1 opinions that post-date the DLI may be relevant to determining whether a claimant was disabled
2 before the DLI, *Smith v. Bowen*, 849 F.2d 1222, 1225-26 (9th Cir. 1988); *Flaten v. Sec’y of Health*
3 *& Human Servs.*, 44 F.3d 1453, 1461 (9th Cir. 1995) (“[t]he claimant may establish such
4 continuous disabling severity by means of a retrospective diagnosis”), post-DLI opinions may be
5 properly discounted where the opinion does not have retrospective applicability or where the pre-
6 DLI evidence is inconsistent with it. *See Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995)
7 (holding that an ALJ may discount a post-DLI opinion that is inconsistent with pre-DLI evidence).
8 Plaintiff fails to demonstrate error in the ALJ’s consideration of the medical opinion evidence.

9 *Jos A. Cove, M.D.*

10 In 2014, Dr. Cove stated Plaintiff is a “reasonable candidate for surgery.” (AR 1620.)
11 Plaintiff argues this “indicates” she would “have severe difficulties in performing the daily tasks
12 required of performing light work.” Dkt. 23 at 8. However, Dr. Cove provided no opinion
13 regarding Plaintiff’s ability to perform light work and did not opine that a person who is a
14 “reasonable candidate for surgery” categorically cannot perform light work. Further, Dr. Cove did
15 not otherwise make findings inconsistent with the medical evidence from the period at issue
16 showing Plaintiff has more functional limitations than the ALJ found.

17 The ALJ did not specifically discuss Dr. Cove’s statement that Plaintiff is a candidate for
18 surgery. An ALJ must explain why “significant, probative evidence has been rejected,” and must
19 explain why uncontroverted medical evidence is rejected. *Vincent v. Heckler*, 739 F.2d 1393, 1395
20 (9th Cir. 1984). However, while the ALJ must “make fairly detailed findings in support of
21 administrative decisions to permit courts to review those decisions intelligently,” the ALJ “need
22 not discuss all evidence presented.” *Id.* at 1394-95. Plaintiff has not established, simply by pointing
23 to treatment notes the ALJ did not discuss, that the ALJ erred in assessing the medical evidence or

1 that there were functional limitations the ALJ should have included but did not.

2 *William Morris, M.D.*

3 Dr. Morris saw Plaintiff twice in 2013. At an initial consultation, Dr. Morris noted Plaintiff
4 “complained of experiencing persistent low back pain with radiating symptoms down her right
5 leg”; “reported that driving longer than 30 minutes aggravated her symptoms”; and “confirmed
6 she had been taking Excedrin.” (AR 26.) Dr. Morris “observed that the claimant ambulated with a
7 normal gait and demonstrated intact balance,” and that she had “full strength and reflexes
8 throughout, and her straight leg raise tests were negative.” (*Id.*) Dr. Morris “concluded that the
9 claimant was a surgical candidate, but referred her to physical therapy in the meantime.” At a
10 follow-up visit, Dr. Morris noted Plaintiff “complained that she continued to deal with low back
11 pain with radiating symptoms down her legs” and “reported that she wanted to proceed with low
12 back surgery after quitting smoking.” (*Id.*) Dr. Morris “concluded that he would recommend
13 additional imaging when the claimant finally reached the point where she was interested in having
14 surgery.” (*Id.*)

15 Plaintiff argues the ALJ erred by not considering a 2014 MRI (AR 1108) that Dr. Morris
16 discussed. Dkt. 23 at 9. Plaintiff argues Dr. Morris “reached diagnoses similar to appointments
17 dating back to 2008.” *Id.* However, Dr. Morris did not opine the MRI showed Plaintiff’s
18 conditioned had worsened since the first ALJ’s decision was issued in 2012 finding Plaintiff not
19 disabled. Dr. Morris’s statement simply repeats what was already before the first ALJ—Plaintiff
20 was a candidate for back surgery. Again, Plaintiff’s argument which simply points to Dr. Morris’s
21 2014 treatment note is insufficient to establish the ALJ harmfully erred in assessing the medical
22 evidence or that there were functional limitations the ALJ should have included but did not.
23 Plaintiff also argues that Dr. Morris “found loss of reflexes at the right knee and ankle joint,” and

1 contends that “[l]oss of reflexes indicates difficulty with walking, standing, and with balance.” *Id.*
2 However, Dr. Morris did not assess any functional limitations to the relevant time period and did
3 not otherwise make findings indicating greater functional limitations than the ALJ assessed. The
4 Court accordingly finds no harmful error in the ALJ’s treatment of Dr. Morris’s post-DLI
5 assessments.

6 *Vanraj Varu, M.D.*

7 On May 29, 2014, Dr. Varu examined Plaintiff and opined she “does not have capacity to
8 work.” (AR 449.) Plaintiff argues Dr. Varu’s opinion “should be construed to indicate that
9 [Plaintiff’s] symptoms precluded her from working as a Ticket Agent.” Dkt. 23 at 8. Plaintiff
10 further argues Dr. Varu’s opinion “corroborates mental health symptoms endorsed by [Plaintiff]
11 in 2013,” that is, within the period at issue. *Id.* However, Dr. Varu’s opinion does not relate back
12 to the relevant period. Dr. Varu first met with Plaintiff after the DLI and thus had no treating
13 relationship with Plaintiff during the relevant period. Dr. Varu also did not provide any opinion
14 regarding the onset date of Plaintiff’s work capacity, or whether Plaintiff’s mental health
15 symptoms were similarly severe prior to 2014. Moreover, the previous ALJ explicitly found in
16 2012 that Plaintiff’s depression and anxiety were severe at step two in a decision that accounts for
17 the time period of August 15, 2005 through May 10, 2012. (AR 105.) Plaintiff does not point to
18 anything in the medical record from the relevant time period showing her depression and anxiety
19 worsened during that period. The Court accordingly finds no harmful error in the ALJ’s treatment
20 of Dr. Varu’s opinions.

21 Plaintiff’s Testimony

22 Where, as here, an ALJ determines a claimant has presented objective medical evidence
23 establishing underlying impairments that could cause the symptoms alleged, and there is no

1 affirmative evidence of malingering, the ALJ can only discount the claimant's testimony as to
2 symptom severity by providing "specific, clear, and convincing" reasons supported by substantial
3 evidence. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). The ALJ may discount Plaintiff's
4 testimony based upon inconsistencies in her testimony or between her testimony and her activities
5 and the medical record concerning the severity of the symptoms of which
6 Plaintiff complains. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996).

7 Here, the ALJ first rejected Plaintiff's testimony as inconsistent with the medical evidence.
8 As discussed above, the ALJ properly assessed the medical evidence and the ALJ thus properly
9 rejected Plaintiff's testimony on this ground. Next, the ALJ found Plaintiff's testimony was
10 inconsistent with her activities, specifically caring for her infant grandchild. Plaintiff argues the
11 ALJ failed to explain how her childcare is inconsistent with her testimony. However, it was not
12 unreasonable for the ALJ to determine that caring for an infant is incongruous with Plaintiff's
13 claim she is disabled due to physical and mental limitations.

14 Finally, the ALJ found Plaintiff made inconsistent statements about falling, which as noted
15 above is a valid basis to discount a claimant's testimony. Plaintiff testified at hearing that she
16 suffered "four extreme falls that have taken me right into the emergency room" (AR 69), yet ALJ
17 noted the lack of evidence in the record to corroborate this claim. (AR 27.) Plaintiff does not
18 challenge this finding.

19 Because the ALJ provided multiple clear and convincing reasons to discount Plaintiff's
20 subjective testimony, the ALJ's findings in this regard are affirmed.

21 RFC

22 Plaintiff argues the Court should find the ALJ's erred in fashioning the RFC because the
23 ALJ failed to properly weigh the medical evidence and also improperly discounted Plaintiff's

1 testimony and the testimony of the lay witnesses. The argument is foreclosed because, as discussed
2 above, the ALJ reasonably weighed the medical evidence and gave valid reasons supported by
3 substantial evidence to discount Plaintiff's testimony.

4 **CONCLUSION**

5 For the foregoing reasons, this matter is AFFIRMED.

6 DATED this 1st day of February, 2021.

7
8 

9 Mary Alice Theiler
United States Magistrate Judge